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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

MYRNA I. JOHNSON,

Plaintiff,

v.

FRED MEYER STORES, INC., a Delaware
corporation; and JAIME SAN MIGUEL,

Defendants.

Case No. 1J-04-008-CV (RRB)

**DEFENDANTS' OBJECTIONS TO
PLAINTIFF'S PROPOSED JURY INSTRUCTIONS**

SUMMARY OF OBJECTIONS

Plaintiff has submitted six proposed jury instructions on liability issues regarding her claim. Defendants object to all six instructions proposed by plaintiff.

From an overall perspective, defendants object because plaintiff's proposed instructions (a) seek to permit the introduction of evidence on discrimination claims already dismissed, and (b) seek to permit plaintiff to pursue a claim other than the sole remaining claim of wrongful discharge by an at-will employee as alleged in Count V. The instructions are not consistent with Alaska law. The instructions also are argumentative and are a

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comment by plaintiff on her view of the evidence. Finally, the instructions seek tort damages when Count V is limited to contract damages. Plaintiff's proposed jury instructions should be rejected.

SPECIFIC OBJECTIONS TO PLAINTIFF'S INSTRUCTIONS

Instruction No. 1. This instruction proposes that "termination will occur only for cause." Plaintiff does not have a "for cause" claim. In addressing Count V of the complaint, this Court already ruled that plaintiff was employed at-will. As the Court stated in its August 21, 2007, Order (Docket 93), this case will "proceed to trial on this single theory" of "a claim for breach of the covenant of good faith and fair dealing" by an at-will employee.

Instruction No. 2. This instruction relates to constructive discharge. It is not a fair statement of the law on constructive discharge, and improperly emphasizes certain words by containing them within a parenthetical. This instruction should be rejected. Instead, the Court should accept defendants' proposed Jury Instruction No. 10 on the elements of a claim of wrongful discharge in breach of the implied covenant of good faith and fair dealing, which include plaintiff's burden to satisfy the two elements of (a) constructive discharge and (b) failure to act in a manner that a reasonable person would regard as fair.

Instruction No. 3. This instruction partially relates to the implied covenant of good faith and fair dealing, the proper and complete definition of which is set forth in defendants' proposed Instruction No. 10. Plaintiff's proposed Instruction No. 3 also improperly uses the word "intentionally" by mixing different theories and different burdens for her wrongful termination claim. Instruction No. 3 should be rejected.

Instruction No. 4. This instruction refers to tort damages which are not appropriate for a claim of wrongful termination in breach of the implied covenant of good faith and fair dealing, for which only contract damages are at issue herein. Moreover, plaintiff's proposed instruction ignores the Court's Order of February 9, 2007 (Docket 81) at 19 which "GRANTED" Defendants' Motion for Summary Judgment "with respect to Counts I - IV

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and VI of Plaintiff's Complaint." Count III was the claim of a violation of plaintiff's "rights under the Family and Medical Leave Act of 1993." Complaint (Docket 1) at page 18, ¶ 111. Accordingly, the FMLA claim dismissed with prejudice cannot serve as the basis for a claim that her termination was in breach of public policy. The Court also should not permit tort damages in this case for the reasons set forth in defendants' brief and jury instructions.

Instruction No. 5. Similar to Instruction No. 4, plaintiff ignores the Court's Order of February 9, 2007, which dismissed with prejudice her claims of age and gender and parenthood discrimination, set forth in Counts II and IV of the Complaint at pp. 16 and 19, respectively. Inasmuch as these claims have been dismissed, they cannot serve as a basis to contend that any public policy was breached by plaintiff's termination. No evidence on tort damages nor any such claim should be permitted to be argued to or submitted to the jury.

Instruction No. 6. Again, similar to Instruction Nos. 4 and 5, plaintiff's proposed Instruction No. 6 ignores the Court's Order of February 9, 2007, at page 19, which dismissed her claim of gender discrimination, Count 1 of the Complaint (page 14). As the claim has been dismissed, plaintiff cannot argue that defendant's actions are in breach of public policy against gender discrimination. Plaintiff cannot pursue such a claim because the Court has ruled that there was no gender discrimination, nor seek the admission of evidence related thereto. Instruction No. 6 should not be accepted.

For the reasons set forth above, defendants contend that all six proposed instructions submitted by plaintiff should not be accepted by the Court.

RESPECTFULLY SUBMITTED this 24th day of September, 2007.

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s/ James R. Dickens

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Certificate of Service

I hereby certify that on September 24, 2007,
a copy of the foregoing was served
electronically on:

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s/ James R. Dickens